

No. 1-10-2377

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES C. McAULIFFE and McAULIFFE)	Appeal from
FAMILY LIMITED PARTNERSHIP,)	the Circuit Court
)	of Cook County.
Plaintiffs,)	
)	
v.)	
)	
THOMAS J. McAULIFFE,)	
)	
Defendant.)	
)	
)	
JOHN M. McAULIFFE and PATRICK B.)	
McAULIFFE, Individually and On Behalf of the)	
McAuliffe Family Limited Partnership,)	
)	No. 07 CH 15006
Plaintiffs-Intervenors-Appellants,)	
)	
v.)	
)	
THOMAS J. McAULIFFE and JAMES C.)	
McAULIFFE,)	
)	
Defendants-Appellees)	
)	
(Mary McAuliffe, Individually and on Behalf of)	
the McAuliffe Family Limited Partnership,)	Honorable
)	William O. Maki,
Plaintiff-Intervenor).)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concur in the judgment.

ORDER

¶ 1 *Held:* Where managing partner failed to fully and frankly disclose the terms of a buyout agreement from limited partnership, the managing partner breached his fiduciary duty to the limited partner. Where limited partners appointed themselves as general partners in contravention of the procedures set forth in the partnership agreement, their appointment was invalid and the limited partners are not entitled to the benefits and protections contained in the partnership agreement that are specifically reserved for the general partners.

¶ 2 This appeal arises out of a complaint in equity filed against defendants Thomas and James McAuliffe for their alleged mismanagement of a family limited partnership. Intervenor Patrick McAuliffe contends that the circuit court erred in finding in favor of defendants on his claim for breach of fiduciary duty in the negotiation of his buyout agreement. Intervenor John McAuliffe appeals from the circuit court's order allowing defendants' attorney fees to be paid with partnership funds. He also challenges the court's determination of the value of his interest in the partnership following a judicial dissolution and the method of distribution. For the following reasons, we affirm in part and reverse in part and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 This case is as convoluted as it is contentious. For clarity, we begin by providing general background about the parties, their relationships, and the origins of this case. We will recite the facts specific to each claim as part of our analysis below.

¶ 5 Cornelius McAuliffe was the father of John, Mary, and Patrick McAuliffe (collectively, Intervenor) and defendants Thomas and James McAuliffe, as well as Ann McAuliffe, who is not

a party to this lawsuit. Cornelius created the McAuliffe Family Limited Partnership (Partnership) in 1995. In a document entitled “Agreement of Limited Partnership of the McAuliffe Family Limited Partnership” (Agreement), dated December 10, 1995, Cornelius designated himself the general partner of the Partnership and named himself and each of his six children as limited partners. Cornelius held a 1% interest in the Partnership as a general partner and a 56.81% interest as a limited partner; James held an 11.18% limited partnership interest; Thomas held 8.71%; John held 5.59%; Ann held 4.66%; Patrick held 4.04%; and Mary held 3.41%. Additionally, Thomas’s wife, Mirna, and his two children were named limited partners, each holding a 0.92% interest. James’s wife, Judith, and his two children also were named limited partners, each holding a 0.92% interest.

¶ 6 The Partnership was created for the purpose of acquiring, owning, and operating multi-unit buildings as rental properties. The Partnership was the sole owner of six buildings, identified here by their street addresses: the Home property, the Central property, the Sawyer property, the Hamilton property, the Ridgeland property, and the Parkside property. It also owned a 50% interest in two other buildings, the Talman property and the Archer property, with Thomas owning the other half. Thomas, James, and Cornelius, or some combination thereof, also co-owned several other properties that the Partnership had no ownership interest in, including the Spaulding property, the Wisconsin property, and the Blue Island property.

¶ 7 Thomas assisted Cornelius with the business operations of the Partnership, while James performed maintenance for the Partnership buildings. Each was paid a salary for his services. None of the other siblings participated in the operation of the Partnership.

¶ 8 On January 25, 2004, Cornelius died. During his life, Cornelius executed a will and a living trust document to govern the disposition of his property. Cornelius named his brother, Maurice, executor of the will and successor trustee of the trust. Cornelius's will instructed that all estate taxes and burial expenses be paid with the assets of the estate and that the remainder of the estate pour over into the living trust. According to the estate tax return, Cornelius owned three bank accounts jointly with each of Ann, John, and Thomas, which totaled more than \$1 million; a 10% interest in four properties co-owned with James or Thomas or both; various securities; and personal property. Pursuant to Maurice's instruction, Ann, John, and Thomas claimed the proceeds of those accounts shortly after Cornelius's death. The probate estate remains open.

¶ 9 The corpus of the trust included Cornelius's general and limited partnership interests, his personal property not otherwise devised, and any real property designated as part of the trust. The trust corpus was to be distributed among his six children according to specific percentages. However, according to the Partnership's 2004 federal income tax return, only Cornelius's limited partnership interest was distributed according to the terms of the trust. His general partnership interest was divided equally between Thomas and James. After that distribution, the limited partners held the following interests in the Partnership: James held a 28.223% interest; Thomas held 22.9125%; John held 14.1115%; Ann held 11.4772%; Patrick held 9.721%; and Mary held 7.9548%. The interests of Thomas's and James's families remained unchanged.

¶ 10 Thomas assisted Maurice in the administration of the estate and they retained professionals to determine the value of Cornelius's estate for tax purposes. Thomas and Maurice

retained Steven Zoller, a certified public accountant, to prepare the estate tax returns. Zoller included Cornelius's partnership interests as assets of his estate and sought a valuation of those partnership interests.

¶ 11 The Partnership's principal assets were the properties. Thomas and Maurice retained Alan and Bonnie Rossell to value the Partnership's properties as of January 25, 2004, the date of Cornelius's death. The Rossells valued the properties in which the Partnership had an interest at \$7,430,000, but discounted the total market value of the properties to \$7,031,000 to reflect that the Partnership only held a partial interest in three of the properties.

¶ 12 Thomas and Maurice also retained David Clarke of the Griffing Group to determine the value of Cornelius's general and limited partnership interests as of January 25, 2004. Clarke relied on the Rossells' appraisals for his report. Clarke deducted the mortgages and other liabilities from the \$7,031,000 discounted value provided by Rossell and concluded that the net value of the Partnership properties was \$5,200,000. Then, according to Clarke's report, "[a]fter adjustment to reflect partial interests," it determined the Partnership's net asset value to be \$4,551,000. Clarke further discounted Cornelius's Partnership interests because they were non-controlling interests and were therefore less marketable. Thus, Clarke concluded that the fair market value of Cornelius's 56.81% limited partnership interest was \$1,810,000 and his 1% general partnership interest was worth \$35,500.

¶ 13 Using the values from the Griffing Group report, Zoller then prepared the estate tax return. He concluded that Cornelius's entire estate was valued at \$3,402,957, with a combined federal and state estate tax liability of \$1,312,273. The federal estate tax return was audited and

affirmed. According to Thomas, Cornelius's estate had no liquid assets; therefore, the estate taxes were paid with Partnership funds. Maurice, Ann, and Thomas all loaned cash to the Partnership to pay the estate taxes. The Partnership then mortgaged two of the Partnership properties and used the proceeds of those mortgages to repay Ann and Maurice in part. Neither Maurice nor Thomas was repaid in full for his contribution.

¶ 14 The Partnership continued to operate after Cornelius's death, pursuant to the terms of the Agreement. Thomas and James managed the Partnership and continued to draw a monthly salary of \$5,000 and \$4,500, respectively. Shortly after Cornelius's death, Thomas met with his siblings and told them that he wanted to buy their limited partnership interests, on behalf of the Partnership, and operate the Partnership jointly with James. As early as April of 2005, Thomas approached each of his siblings, other than James, with an offer to purchase their interests. Thomas had buyout agreements prepared by an attorney, Alexander Domanskis, who was also the attorney for Cornelius's estate.

¶ 15 In August of 2005, Patrick signed a buyout agreement proposed by Thomas on behalf of the Partnership, and Ann signed a similar agreement in October of 2005. The Partnership's 2005 federal income tax return reflected that by year's end, Patrick and Ann held no interest in the Partnership.

¶ 16 Thomas presented John and Mary with buyout offers also, but neither accepted the offer or signed a buyout agreement. Nevertheless, the Partnership's 2005 federal income tax return reflected that John and Mary also held no interest in the Partnership. The 2005 filing showed that Thomas held a 45.0448% limited partner interest, James held a 50.3552% limited partner

interest, and their families held the remainder.

¶ 17 In the summer of 2006, James confronted Thomas with his concerns that Thomas was mismanaging the Partnership's money. James believed that the Partnership's bank account balances were "much less" than he expected them to be. He also noticed that while Thomas's salary was only \$5,000 per month, he took many vacations and owned several cars.

¶ 18 In December of 2006, Thomas, Maurice, and Ann organized an intervention on behalf of the family to encourage James to enter into a substance abuse treatment program for his alcohol abuse. They gave him a letter stating that Maurice would operate his Partnership interest while he was away and that if he did not complete the program, then James would relinquish his interest entirely. It also stated that going forward, his salary would be used to repay the Partnership and other family members for money he had borrowed. James entered a treatment program, but did not complete it.

¶ 19 After the intervention, James was "no longer allowed" to manage Partnership properties because Thomas did not think that he was capable of doing so. However, James was never removed as a general or limited partner and retained the largest ownership interest in the Partnership. Thomas did not pay James any distributions of the profits of the Partnership. Thomas also did not pay James his monthly salary; rather, he deposited James's salary in a "segregated" bank account of which Thomas was the sole owner. James was unable to access any of the money in the segregated account and it was used to repay family loans.

¶ 20 In June of 2007, after an unsuccessful attempt to recover his salary and participate in the management of the Partnership, James filed a derivative lawsuit against Thomas on behalf of the

Partnership. In it, James alleged that Thomas breached his fiduciary duty to him and the Partnership by excluding him from the management and control of the Partnership. Among other things, he alleged that Thomas refused to provide him access to the Partnership's financial records and refused to provide him any profits, cash flow, distributions, and other compensation, in violation of the Agreement. He sought an accounting and a judicial dissolution of the Partnership.

¶ 21 Thomas answered the complaint and filed affirmative defenses in which he also sought a dissolution of the Partnership because James's allegedly detrimental acts would impede the Partnership's ability to carry out its business purpose. Thomas alleged, among other things, that James was a "drug addicted alcoholic" who had stolen money and property from the Partnership and accepted sexual favors in lieu of rent. Thomas also sought a court-ordered psychological evaluation of James at the start of the litigation.

¶ 22 On September 7, 2007, Intervenors petitioned to intervene in this case. They filed four derivative claims against Thomas and James on behalf of the Partnership. In count I of their amended complaint, Intervenors alleged that Thomas and James used Partnership assets and income for their own benefit. They sought an accounting, the imposition of a constructive trust, and the appointment of a receiver, among other things. In count II, Intervenors sought dissolution of the Partnership because Thomas and James improperly appointed themselves general partners after Cornelius's death and because they mismanaged the Partnership. In count III, Intervenors alleged that Thomas and James's mismanagement was a breach of their fiduciary duties because they advanced their own interests at the expense of the Partnership and attempted

to exclude or remove Intervenor from the Partnership. In count VI, Intervenor sought a declaration that Thomas and James were not entitled to indemnification from the Partnership for attorney fees they incurred in this litigation.

¶ 23 Counts IV and V of the complaint were personal claims made by Patrick against Thomas for Thomas's actions in the negotiation and execution of Patrick's Partnership buyout agreement. In count IV, Patrick sought to rescind his buyout agreement because it was a product of Thomas's misrepresentations and undue influence. In count V, Patrick asserted that such misrepresentations also constituted a breach of fiduciary duty and sought compensatory damages for the breach.

¶ 24 Thomas later filed counterclaims against James and the Intervenor alleging they were unjustly enriched by Thomas's and the Partnership's payment of their share of Cornelius's estate taxes. He also filed a claim for unjust enrichment against James because James benefitted from the Partnership's payment of his divorce settlement and other related expenses totaling more than \$450,000.

¶ 25 Intervenor filed a petition to appoint a receiver to manage the Partnership. They alleged that Thomas and James had commingled personal and Partnership funds and failed to properly maintain the Partnership's business records. Additionally, Intervenor again alleged that Thomas and James had improperly appointed themselves as general partners in contravention of the procedures provided for in the Agreement. That is, although the Agreement required that "at least seventy five (75%) [*sic*] of the Profit Sharing Interests shall appoint one or more successor general partners" after Cornelius's death, Thomas and James appointed themselves as general

partners despite the fact that they only owned a combined 55.7355% of the Partnership interests.

¶ 26 During the hearing on Intervenor's petition, Thomas was the only witness to testify. He first testified as an adverse witness. Thomas identified the Partnership's 2004 federal income tax return that he signed, which showed that at the end of 2004, he owned a 22.9125% interest in the Partnership and James owned 28.233%. He then testified that he and James became general partners of the Partnership after signing a document prepared by Domanskis, dated January 1, 2005. The document represented that Thomas and James held a combined 78% of the profit sharing interest of the Partnership and, thus, they elected themselves general partners. When asked to explain the difference in the documents purporting to show their percentage ownership, Thomas stated that the document was actually signed in October of 2005 after acquiring Ann and Patrick's interests, but that it was "back-dated" to January 1, 2005. Thomas also testified that he never notified his siblings of the need for an election or solicited their votes.

¶ 27 Thomas then testified about the management of the Partnership. He stated that for several years, he was renting advertising space and cellular tower access on buildings he owned jointly with the Partnership, but that he retained all of that rental income and did not contribute any of it to the Partnership.

¶ 28 Thomas testified that tenants living in Partnership buildings made their rent checks payable to him personally and that he deposited the checks into a bank account owned by him but used for Partnership purposes. He also testified that when tenants paid their rent in cash, he would deposit the cash in a safe in his home rather than deposit it in the bank. He collected at least \$15,000 per month in cash. He testified that he used the cash for Partnership expenses, but

did not maintain any records of the income or expenses related to the cash deposits. He testified that he had done that for the four years he had been managing the Partnership.

¶ 29 Thomas testified that he never deposited any rent from the Talman and Archer buildings, which he personally co-owned with the Partnership, into the Partnership accounts. He also testified that he used Partnership funds to pay the mortgage, property taxes, and insurance on two properties that were not owned in any proportion by the Partnership. However, he stated that the Partnership collected the rent on those properties.

¶ 30 Thomas also testified that he used Partnership funds to pay for James's \$450,000 divorce settlement and related expenses in late 2006 and did not seek approval from the other limited partners before doing so. Thomas had his attorney prepare a written agreement between Thomas and James, individually, stating that Thomas would loan James the money and James would repay Thomas within two years, or relinquish his share of a property he owned jointly with Thomas. When asked to explain why the agreement was between Thomas and James but paid with Partnership funds, Thomas stated that he intended for the agreement to be a "personal guarantee" of James's loan to the Partnership. However, the Partnership was not a party to that agreement and Thomas did not state whether a separate agreement existed between himself and the Partnership.

¶ 31 Thomas identified several checks that he wrote from the Partnership checking account to pay for other expenses related to James's divorce. He wrote a check payable to Cash in the amount of \$76,290 and the check memo read "Jim's divorce." He wrote a check for \$10,000 to James for a "loan," a check for \$35,000 to an attorney named George Fewell, and a check for

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\$2,025 to James's ex-wife for child support payments. James never repaid this money to the Partnership, which, along with the settlement, totaled approximately \$600,000.

¶ 32 Thomas also testified that the Partnership did not have a business credit card. Rather, he used his personal credit card to pay for some Partnership expenses. However, he paid his entire credit card bill with Partnership funds. He also paid his 2006 personal federal income taxes with Partnership funds because he said the Partnership owed him money. He also testified that his attorney fees in this case were paid on an ongoing basis with Partnership funds.

¶ 33 Thomas testified that he did not maintain any financial statements for the Partnership. He maintained what he called "rent boards," which were charts showing the actual rent received from each tenant for each month in each building. His system for documenting expenses consisted of placing receipts into "bins" that were designated as Partnership or non-Partnership expenses; however, the receipts were not otherwise marked to indicate their purpose or to which property they pertained.

¶ 34 Thomas then testified that in February of 2008, about three months before the receivership hearing, he changed some of his business practices. He closed the bank accounts held in his name and opened new accounts owned by the Partnership. He had his tenants make their rent checks payable to the Partnership and deposited them in the Partnership account, along with cash rent payments. Additionally, he and Mirna began keeping financial records for the Partnership.

¶ 35 The court ultimately denied Intervenor's petition for receivership, reasoning that because Thomas recently changed his business practices, the Partnership was not in imminent danger of

loss under Thomas's control. The court further found that "[n]one of the evidence is persuasive in terms that suggests that the history of Thomas and James being appointed or appointing themselves as general partners was inappropriate."

¶ 36 Intervenor then filed a motion for partial summary judgment on the issue of dissolution. In it, they again argued, among other things, that Thomas and James's improper self-appointment as general partners prevented the Partnership from carrying out its business and that dissolution was the appropriate remedy.

¶ 37 In response, Thomas argued that "[a]lthough James and Thomas did not hold the requisite 75% interest in the Partnership" necessary to duly appoint themselves general partners under the terms of the Agreement, they held the "majority" of the interest, which they argued entitled them to appoint themselves general partners so that they could continue to run the day-to-day operations of the Partnership. In any event, Thomas argued, the improper appointment was not grounds for dissolution.

¶ 38 On August 1, 2008, the court granted Intervenor's motion for partial summary judgment on the dissolution claim "for the reasons stated in open court." However, a transcript of the hearing is not included in the record on appeal. The court ordered the Partnership judicially dissolved and stated that the claim would proceed to trial to determine the process for winding up the Partnership. The court found that after "review[ing] the Limited Partnership [A]greement[, it] recognize[d] the authority of the two general partners to wind up the affairs of the Limited Partnership," but permitted all parties to file their proposed wind-up plans with the court.

¶ 39 James then filed a motion seeking payment of \$100,000 in attorney fees from the

Partnership for bills accrued in this litigation. Intervenor's objected, arguing that James had not produced any documentation supporting his claimed fees. Thomas also objected, arguing that James was not being sued for actions or inactions related to his position as a general partner, as provided for in the Agreement. The court nevertheless awarded James's attorneys \$25,000 per month for three months and thereafter, they would be paid for fees and expenses as incurred. The court reserved ruling on Intervenor's request that the general partners be required to reimburse the Partnership for attorney fees paid if they were found to have engaged in wrongdoing.

¶ 40 II. PATRICK'S CLAIMS FOR BREACH OF FIDUCIARY DUTY AND RESCISSION

¶ 41 A. Facts

¶ 42 In August and September of 2009, the court held a five-day hearing to resolve Patrick's claims to rescind his buyout agreement with the Partnership and to seek compensation for Thomas's breach of fiduciary duty in negotiating that agreement.¹ Patrick based his claims on alleged misrepresentations Thomas made to him during the negotiations. He claimed, among other things, that Thomas undervalued the Partnership and, by extension, his share of the Partnership. He also claimed that Thomas improperly deducted a portion of Cornelius's estate taxes from the value of his Partnership interest. He further contended that the agreement was never consummated because he never received a conveyance of the property that was supposed to be part of his consideration.

¹ On the first day of the hearing, the court dismissed Mary as one of the Intervenor's pursuant to a settlement agreement she entered into with Thomas and James. In that agreement, Mary sold her interest directly to Thomas and James and they divided her interest equally among themselves.

¶ 43 In support of his claims, Patrick called his experts, Ronald Diehl and Gregory McKnight, to testify to the value of the Partnership. Patrick and Thomas also testified to their respective versions of the events surrounding Patrick's buyout. Thomas first testified as an adverse witness in Patrick's case, and then again in his own case. Thomas also called his wife, Mirna, to testify about certain financial reports she created for the Partnership.

¶ 44 *1. Evidence Presented at the Hearing*

¶ 45 Patrick testified that he and Thomas first met to discuss Patrick's buyout in August of 2005. At that time, Thomas presented him with three documents, which Thomas described as the "financials" of his buyout. The first document was a copy of a May 20, 2005, letter from Zoller to Thomas stating in summary that on the date of Cornelius's death, the Partnership was valued at \$3,186,000 and Cornelius's 56.81% interest in it was worth \$1,810,000.

¶ 46 The second document was a typed set of calculations showing the value of Patrick's interest and was dated May 1, 2005. Later in the proceedings, Thomas would testify that Zoller prepared the document, but he was impeached with his deposition testimony in which he claimed to have prepared it himself. Regardless, the document identified a "Pre-Death" value of Patrick's interest based on his percentage ownership before Cornelius died. It also determined the value of that portion of Cornelius's limited partnership interest that Patrick received pursuant to the terms of Cornelius's trust. It then deducted 48% from that value to represent the amount of the estate taxes Patrick was obligated to pay, arriving at the "Post-Death" value of Patrick's inherited interest. Patrick's total interest was determined to be \$222,856, the sum of the Pre-Death and Post-Death values.

¶ 47 The third document was a set of handwritten calculations prepared by Thomas. Starting with the \$222,856 amount, Thomas added Partnership income that Patrick was due, deducted a 12% “management fee,” and deducted \$3,000 for Patrick’s share of Cornelius’s burial costs. From that number, Thomas deducted \$200,000, which represented the value of a Blue Island property that Patrick would receive as part of his consideration. According to the document, the balance owed to Patrick was \$47,771. Thomas testified that all of the information contained in the third document came from the experts’ appraisal and valuation reports.

¶ 48 Patrick stated that Thomas did not explain the calculations to him or provide him with any supporting documentation, such as the appraisals, the estate tax return, the Partnership income tax returns, the Griffing Group report, the rent boards, or financial statements. Nor did Thomas give him the Agreement or the will and trust documents. On cross-examination, Patrick admitted that he never asked for any of those documents because he assumed Thomas was telling him the truth and that his figures were correct.

¶ 49 Patrick testified that he did not want to sell his interest in the Partnership. He testified that he felt he had no choice in the matter because Thomas kept “pushing the issue.” Nevertheless, on August 19, 2005, Patrick entered into an agreement with the Partnership, signed by Thomas and James, to sell his 9.7210% interest back to the Partnership. The agreement states that the purchase price for Patrick’s interest was \$47,776 in cash.^{2,3} He testified that Thomas

² We note that the agreement makes no mention of the Blue Island building that was included as part of Patrick’s consideration. However, the parties do not make any claims or arguments in this regard.

³ The agreement reflects that Patrick’s consideration was \$47,776 in cash. Both Patrick and Thomas testified that Patrick received \$47,771. However, the discrepancy is not at issue here.

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gave him a brown paper bag containing the cash, which he accepted, and then signed the buyout agreement because Thomas told him he “had to.” He did not consult with an attorney before entering into the agreement because he “wanted *** to get it over with.” He stated that he accepted the calculations Thomas gave him and did not learn that his Partnership interest was undervalued until James told him two years later that “everything was valued real low and [the siblings] got the raw end of the deal.”

¶ 50 Thomas then testified as an adverse witness. He stated that he presented Patrick with the three aforementioned documents in June of 2005. He also testified that he gave Patrick a fourth document prepared by Zoller and addressed to Thomas. That document showed how the value of Cornelius’s limited partnership interest was apportioned among the siblings according to the terms of Cornelius’s trust.

¶ 51 Thomas explained that the Blue Island property referenced in the documents was an apartment building owned 90% by him and 10% by Cornelius’s estate. Before Cornelius died, he agreed to sell the Blue Island property to Patrick for \$200,000. Patrick was in the process of obtaining financing to purchase the property when Cornelius died. Patrick assumed control of the property in 2003, but had not purchased it. By giving Patrick a credit for \$200,000 in his buyout, Thomas intended to complete Patrick’s purchase of the Blue Island property.

¶ 52 Thomas acknowledged that although the buyout agreement was between Patrick and the Partnership, and the cash portion of Patrick’s consideration was paid with Partnership funds, the Partnership did not technically own the Blue Island property that was to be conveyed. Thomas testified that he intended to transfer his 90% interest in the property to Patrick and to have

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Maurice transfer the estate's 10% interest to Patrick. He then testified that after all of the buyouts were completed, he and James intended to "reconcile" with each other and the Partnership to determine whether either of them should be reimbursed for personal property they contributed during the buyouts. Nevertheless, at the time of this hearing, the Blue Island property had not yet been conveyed to Patrick.

¶ 53 Thomas testified that when he discussed the buyout with Patrick, he did not present Patrick with the Griffing Group's report on the value of the Partnership. Nor did he provide Patrick with the Rossell appraisals that were used in that valuation. He did not provide Patrick with copies of Cornelius's estate tax return or any of the Partnership's income tax returns. He did not provide Patrick with any of the Partnership's financial or bank statements or copies of the rent boards for the Partnership properties.

¶ 54 When asked why he only gave Patrick the three aforementioned documents, Thomas testified that he gave Patrick "information that was given to [him] that [he] thought would be relevant for someone to look at these numbers and say this would – this is what my buyout is, and this is how I got these numbers." Thomas admitted that he never personally read the Griffing Group report or the estate tax filing because he did not understand them; he only looked at the conclusions. Thomas further testified that he did not give Patrick any of the supporting documentation because "if [Thomas] didn't understand it, [he] didn't know [Patrick] would understand it." Nevertheless, he stated, he would have provided Patrick with any requested documentation, as he did when his sister, Ann, asked for more information before signing her buyout agreement.

¶ 55 Thomas also testified that he charged his siblings a management fee in their buyouts because he and James were doing more work for the Partnership after Cornelius died. He said that he researched an appropriate management fee and learned that 12% was reasonable. He also said that Maurice, in his capacity as the executor, ordered that burial fees be divided among five of the siblings, which Thomas deducted from the buyout.

¶ 56 Patrick then called Ronald Diehl to testify as an expert in accounting. He analyzed the Partnership's cash flow based on rental income and expenses. He opined that the Partnership had several hundred thousand dollars in net income available for distribution to the limited partners at the end of 2004 and 2005. He also testified that in his opinion, the Partnership lacked an "internal control structure." It did not prepare any of the financial statements he would expect to see in such an organization.

¶ 57 Gregory McKnight then testified as an expert in business valuation. McKnight prepared a report valuing the Partnership and Patrick's interest in it. He criticized Thomas's use of the Rossell appraisals, the Griffing Group report, and the estate tax return prepared by Zoller in calculating Patrick's interest because those reports were created a year and a half earlier for the purpose of preparing the estate tax return, not for valuing Patrick's interest in August of 2005.

¶ 58 McKnight also discovered an error in the Griffing Group report. That report discounted the value of the Sawyer property to reflect that the Partnership owned only one-third of the property. However, the supporting documentation showed that the Partnership owned 100% of the Sawyer property and, therefore, the entire value of that property should be included in the calculation of the Partnership's value.

¶ 59 McKnight also criticized the Griffing Group's analysis because it discounted the value of the Partnership properties from \$5.2 million to \$4.551 million, with "no explanation" other than a reference to the Partnership's "partial interests." He also opined that the Griffing Group's analysis deducted more in property taxes than was warranted. McKnight also did not believe that Cornelius's partnership interests should be discounted to reflect a lack of marketability because they were not being sold in arm's length transactions.

¶ 60 McKnight further criticized the Griffing Group's analysis because it did not include other assets such as cash receivables, supplies, and inventory. It also did not account for what McKnight believed was a 6% annual appreciation in the value of the Partnership properties between January of 2004 and August of 2005. Nevertheless, he admitted that he did not conduct new real estate appraisals of the properties as of August of 2005.

¶ 61 McKnight also criticized the Partnership's treatment of Cornelius's estate taxes and James's divorce expenses and its effect on Patrick's interest. McKnight opined that under the terms of Cornelius's trust, the estate was responsible for the payment of estate taxes, not the Partnership. Nevertheless, McKnight's report stated that because Partnership funds were used to pay the taxes, that should be treated as the indebtedness of Cornelius's estate to the Partnership. Similarly, James's divorce expenses should be treated as James's indebtedness to the Partnership. Moreover, any tax Patrick owed on his inheritance would be accounted for on his personal income taxes, not deducted from the value of his Partnership interest.

¶ 62 In conclusion, McKnight determined that the Partnership was valued at over \$6 million as of August of 2005, about \$3 million more than the Griffing Group's value. As a result,

McKnight concluded that Patrick's interest was worth nearly \$700,000, which excluded any credit for the transfer of the Blue Island property.

¶ 63 Thomas then called Mirna to testify. She stated that she created income and expense reports for the Partnership for the years 2004 through 2008. She testified extensively on the method used to create her reports. The reports were a compilation of all of the information available in the Partnership's records for those years, including the rent boards, bank account statements, mortgage payments, and expense receipts. Mirna's reports revealed that the net income for the Partnership for 2004 and 2005 was approximately \$100,000 each year.

¶ 64 Thomas testified again in his case. He explained that he assisted in creating Mirna's reports. He again admitted that although he relied exclusively on his experts' reports in calculating the value of Patrick's interest, he did not provide any of those reports or any other financial or legal documents supporting his calculations to Patrick at the time he presented the buyout agreement. He stated that he did not believe the documents were "relevant." Thomas then rested. He did not call Clarke to testify in rebuttal about the contents of the Griffing Group report and chose to rely on the report itself.

¶ 65 *2. The Court's Ruling*

¶ 66 The court determined that there was an undisputed fiduciary relationship between Thomas and Patrick. It also determined that they engaged in a transaction in which Thomas, the dominant party in the relationship, benefitted. In such a case, the burden then shifted to Thomas to prove by clear and convincing evidence that he acted in good faith in executing that transaction, as evidenced by three factors: (1) that he made a free and frank disclosure of all

relevant information; (2) that the consideration offered was adequate; and (3) that Patrick had competent and independent advice before completing the transaction.

¶ 67 The court found that as to the first element, Thomas told Patrick “all he knew” and that the three or four documents he presented to Patrick “accurately reflected all the information [Thomas] had at that time.” The court then noted that the Zoller letters were based on the Griffing Group report, which was itself based on the Rossell appraisals. It noted the dispute in the evidence between the Griffing Group report, which applied a 30% discount to the value of Cornelius’s Partnership interest, and McKnight’s testimony, opining that the amount of the discount was inappropriate, and concluded that the Griffing Group report was an acceptable valuation of the Partnership.

¶ 68 However, the court acknowledged that the Griffing Group report contained an error in its valuation of the Partnership properties. It noted that the Partnership in fact owned 100% of the Sawyer property, not one-third of the property as noted in the Griffing Group report. However, the court noted, that error did not constitute fraud on Thomas’s part.

¶ 69 The court then discussed the payment of the estate taxes. It determined that Thomas credibly explained that he paid Cornelius’s estate taxes with Partnership funds because there was no other cash available to pay the taxes, “which in part was the result of the actions of the executor of the estate.” The court then concluded that Thomas had satisfied the first element of freely and frankly disclosing all relevant information.

¶ 70 Addressing the second factor, the court found that Patrick’s consideration was adequate, “taking into consideration all of the other evidence that has been presented in this case.” It found

that Patrick's consideration consisted of the Blue Island property and \$47,771 in cash. It then ordered that the Blue Island property be conveyed to Patrick.

¶ 71 Turning to the third factor, the court found that "nothing prevented Patrick from seeking independent advice" before entering into the buyout agreement. It noted that Patrick asked Thomas no questions and trusted Thomas's calculations. It also noted Thomas's testimony that he would have given Patrick information if he had asked for it. The court found that Thomas sustained his burden of proof on all three factors and, therefore, Thomas did not breach his fiduciary duty.

¶ 72 The court further denied Patrick's claim to rescind the agreement based on fraud or misrepresentation. The court concluded that Thomas did not intentionally conceal any information from Patrick during the buyout negotiations. It found that Patrick's consideration was reasonable and again noted that Patrick "exercised no diligence whatsoever in negotiating the buyout."

¶ 73 B. Analysis

¶ 74 On appeal, Patrick challenges the court's findings. He argues that Thomas breached his fiduciary duty in negotiating the buyout agreement because Thomas undervalued the Partnership and his interest in it. Additionally, he argues that Thomas failed to provide him with all relevant information that would have allowed him to properly evaluate Thomas's buyout offer.

¶ 75 A fiduciary relationship exists among all partners in a partnership, obligating each partner to exercise "the utmost good faith in all dealings and transactions related to the partnership."

1515 North Wells, L.P. v. 1513 North Wells, L.L.C., 392 Ill. App. 3d 863, 874 (2009) (quoting

Seymour v. Williams, 249 Ill. App. 3d 264, 269 (1993)). This fiduciary duty “ ‘prohibits all forms of secret dealings and self-preference in any [partnership] matter.’ ” *Pielet v. Hiffman*, 407 Ill. App. 3d 788, 795 (2011) (quoting *Winston & Strawn v. Nosal*, 279 Ill. App. 3d 231, 239-40 (1996)).

¶ 76 A managing partner has a heightened obligation to deal fairly and openly with his fiduciaries and to disclose completely. *Cronin v. McCarthy*, 264 Ill. App. 3d 514, 524 (1994). To that end, it has long been recognized that when a managing partner benefits in a transaction involving one of his fiduciaries, it is presumed that the transaction was fraudulent. *In re Estate of Marks*, 211 Ill. App. 3d 53, 64 (1991) (quoting *Dombrow v. Dombrow*, 401 Ill. 324, 332-33 (1948)); *Rizzo v. Rizzo*, 3 Ill. 2d 291, 305 (1954). However, the fraud need not have resulted from actual dishonesty or an intent to deceive; rather, the managing partner may have engaged in constructive fraud, which is “ ‘no less fraudulent, either in law or in morals, because it is called constructive fraud.’ ” *LaSalle National Trust v. Board of Directors of the 1100 Lake Shore Drive Condominium*, 287 Ill. App. 3d 449, 455 (1997) (quoting *Warner v. Flack*, 278 Ill. 303, 313 (1917)).

¶ 77 In such cases, all doubts are resolved against the managing partner and he bears the burden of proving his innocence. *Cronin*, 264 Ill. App. 3d at 524. The managing partner must rebut the presumption of fraud by providing clear and convincing evidence that the transaction was fair. *In re Estate of Marks*, 211 Ill. App. 3d at 64 (quoting *Dombrow*, 401 Ill. at 332-33). To do so, the managing partner must demonstrate: (1) that he has made a free and frank disclosure of all information he had that was relevant to the transaction; (2) that the consideration

was adequate; and (3) that the subordinate fiduciary had competent and independent advice before completing the transaction. *In re Estate of Marks*, 211 Ill. App. 3d at 64 (quoting *Dombrow*, 401 Ill. at 332-33); *Rizzo*, 3 Ill. 2d at 305.

¶ 78 A breach of fiduciary claim is a fact-intensive inquiry and we will not disturb the circuit court's factual findings unless they are against the manifest weight of the evidence. *1515 North Wells*, 392 Ill. App. 3d at 874; *Dowd and Dowd, Ltd. v. Gleason*, 352 Ill. App. 3d 365, 373 (2004). A decision is not against the manifest weight of the evidence unless an opposite conclusion is clearly evident. *In re Estate of Wilson*, 238 Ill. 2d 519, 570 (2010). In particular, if the record contains any evidence to support the circuit court's findings in a bench trial, the judgment should be affirmed. *In re Estate of Wilson*, 238 Ill. 2d at 570.

¶ 79 Here, the circuit court determined that Thomas acted as the dominant fiduciary in the transaction with Patrick and that Thomas received a benefit in this transaction by virtue of this position. The parties do not dispute those findings. The court then found that, after the burden shifted to Thomas, he proved by clear and convincing evidence that he freely and frankly disclosed all information relevant about the buyout transaction to Patrick.

¶ 80 After careful review of the record, we conclude that the circuit court's finding was against the manifest weight of the evidence. At the time Thomas offered to buy Patrick's partnership interest, he presented Patrick with a few documents containing summary information about the total value of the Partnership, the gross value of Patrick's share, and the deductions taken from Patrick's share. The circuit court concluded that those summary documents "accurately reflected all the information [Thomas] had at that time" of the proposed buyout.

¶ 81 However, that conclusion directly conflicts with testimony Thomas provided as both an adverse witness and in his own case. Thomas testified that he had possession of the 2004 Rossell appraisal reports, the Griffing Group report, the estate tax return, Zoller's letters, and all information about the Partnership's income and expenses at the time he prepared his buyout offer. He testified that he relied exclusively on the experts' reports in preparing his calculation of Patrick's partnership interest and the amount that he would ultimately offer to Patrick. Thus, there is nothing in this record to support the court's finding that by providing Patrick with the summary documents, Thomas provided Patrick with "all he knew" about the basis of his offer. Rather, the opposite conclusion is clearly evident.

¶ 82 As the managing partner in possession of the Partnership's financial and legal information, and the dominant fiduciary in a proposed buyout, Thomas had an affirmative obligation to provide Patrick with all information that was relevant to the buyout transaction; it was not Patrick's obligation to request it. Moreover, despite Thomas's testimony to the contrary, the expert reports and financial documents, on which Thomas exclusively relied to prepare his buyout offer, were indisputably relevant to the transaction. On the other hand, Thomas's subjective belief that he was excused from providing Patrick with the information because he did not think Patrick would understand it is irrelevant.

¶ 83 As a consequence of Thomas's failure to sustain his burden, Patrick's buyout transaction is presumed fraudulent. *In re Estate of Marks*, 211 Ill. App. 3d at 64; *Rizzo*, 3 Ill. 2d at 305. However, the circuit court found that Thomas did not exhibit bad faith in entering into this transaction and we cannot say that the opposite conclusion is clearly evident. Thus, absent

evidence of an intent to deceive, Thomas's actions amount to constructive fraud, rather than actual fraud, but fraud nonetheless. *LaSalle National Trust*, 287 Ill. App. 3d at 455.

¶ 84 As appellant notes, often the remedy in a case such as this is to set aside the fraudulent transaction altogether. *In re Estate of Marks*, 211 Ill. App. 3d at 64; *Dombrow*, 401 Ill. at 333. However, this court has also recognized that an award of damages is an appropriate remedy for a breach of fiduciary duty resulting from constructive fraud where, as here, the plaintiff has only prayed for money damages in his complaint. *LaSalle National Trust*, 287 Ill. App. 3d at 453, 457-58; *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1071 (2001) ("the appropriate remedy for a breach of fiduciary duty *** is within the equitable discretion of the court"). Under the circumstances of this case, we urge the circuit court to award Patrick monetary damages on remand. It is significant that during the hearing, the court discovered an error in the Griffing Group report that incorrectly discounted the value of the Sawyer property and resulted in an undervaluation of the Partnership and Patrick's interest in it. An appropriate monetary award should compensate Patrick for the difference in those calculations.

¶ 85 The court then briefly addressed the adequacy of Patrick's compensation and his access to an independent review of the transaction. As to those factors, we cannot say that the court's findings were against the manifest weight of the evidence. On appeal, Patrick cites several factors that he believes makes his compensation inadequate and cites his experts' testimony in support of his argument. However, Thomas presented evidence in support of the amount he offered to Patrick in the form of his testimony and his experts' reports. Although Patrick's experts strongly criticized the methodology used by Thomas and his experts, the circuit court

chose to credit the evidence presented by Thomas, notwithstanding the Griffing Group's computational error, and concluded that the consideration offered was adequate. Where there is any evidence to support the court's factual findings, we must affirm. *In re Estate of Wilson*, 238 Ill. 2d at 570.

¶ 86 Additionally, after hearing testimony from both Thomas and Patrick, the circuit court concluded that Patrick was not prevented from seeking an independent review of the terms of the offer. There was little evidence presented on this issue, but it is significant that Patrick testified that he was aware that he could have sought independent advice and chose not to. Thus, we cannot say that the court's conclusion was against the manifest weight of the evidence.

¶ 87 On appeal, Patrick does not specifically challenge the court's dismissal of his claim for rescission and, thus, we will not address it. Rather, Patrick appears to argue that he is entitled to rescission as relief for Thomas's breach of fiduciary duty, which is not consistent with the claims made in his complaint. As we have discussed, the appropriate remedy for the breach of fiduciary duty in this case is monetary damages, which Patrick prayed for in his complaint.

¶ 88 III. JOHN'S DERIVATIVE CLAIMS⁴

¶ 89 A. Facts

¶ 90 After disposing of Patrick's claims, the case proceeded to trial on John's derivative claims for an accounting, breach of fiduciary duty, declaratory judgment, and a post-dissolution wind-up plan. The trial was conducted over seven days in March, April, and June of 2010.

⁴ The court's prior orders in this case dismissed Mary pursuant to a settlement agreement and affirmed the validity of Patrick's buyout agreement. Therefore, John is the only remaining Intervenor pursuing the derivative claims.

¶ 91 1. *The Settlement Agreements Between Thomas and James*

¶ 92 On the first morning of trial, James sought the court's approval of two settlement agreements that he and Thomas entered into in February and June of 2009. The settlement agreements stated that James and Thomas were mutually releasing their legal claims against each other and that they agreed to divided the Partnership's properties among themselves as indicated in an attached calculation. Their calculations began with the assumption that John was the remaining Intervenor and that he held a 16.9% interest in the Partnership. They divided the remaining interest among themselves, reflecting that Thomas ultimately would hold a 47.79% interest and James would hold a 52.183% interest. Using a total Partnership value of \$5,200,229, Thomas and James determined that their interests were worth \$2,485,189 and \$2,713,635, respectively. They then apportioned the Partnership properties among themselves to equal the value of their interests.

¶ 93 James's counsel represented to the court that the settlement agreements relied on an additional assumption that as a limited partner, John was only entitled to a cash distribution, and not an in-kind distribution of property, citing section 16.2 of the Agreement in support. James sought approval of the settlement agreements because, if the court disagreed with that interpretation of section 16.2, then the settlement agreements would need to be renegotiated. John objected, arguing that he was entitled to an in-kind distribution of property and that, nevertheless, the court should refrain from making any ruling on the final distribution of Partnership property until the value of the Partnership had been determined based on the evidence presented at trial.

¶ 94 The court treated James's request as a motion for summary judgment on the issue of John's entitlement to an in-kind distribution under section 16.2 of the Agreement. It then granted the motion in James's favor, ruling that John was only entitled to a cash distribution.

¶ 95 *2. Evidence Presented at Trial*

¶ 96 *a. Evidence Presented by John*

¶ 97 The case then proceeded to trial on John's claims. John called several experts to testify in support of his valuation of the Partnership for the purposes of winding up: Francis Lorenz testified to the value of the Partnership properties; Diehl testified regarding the Partnership's cash flow, as he did in Patrick's hearing; John Yednock testified to the estimated value of personal property owned by the Partnership; and Regina Popielec testified to the rate charged by property managers. He also called Julio Lopez and Mary Villareal, Partnership employees, to testify to Partnership operations. John then called James and Thomas to testify as adverse witnesses and testified on his own behalf.

¶ 98 Francis Lorenz testified as an expert real estate appraiser. He appraised 12 properties, most of which were owned in whole or in part by the Partnership. The appraisals valued the properties as of late January and early February of 2008. He concluded that the 9 properties owned wholly or partly by the Partnership were valued at \$11,470,000. Lorenz also revisited his appraisals as of the time of trial and concluded that the values were roughly the same. Lorenz also testified that he reviewed the appraisals of an expert hired by James and his values were the same or lower than those calculated by James's expert.

¶ 99 Lorenz valued the buildings using the income approach and the sales approach. Using

the income approach, he estimated the gross income the buildings would generate and compared that with similar properties in the area. The sales approach required Lorenz to value the properties based on the sale price of comparable properties. On cross-examination, Thomas's and James's attorneys questioned Lorenz at length about the comparable properties he relied on.

¶ 100 John then called Ronald Diehl to testify regarding the Partnership's cash flow. His testimony at trial was substantially the same as the testimony he provided at the hearing on Patrick's claims. He used the rent boards and expense documents to determine the Partnership's cash on hand for the relevant time period.

¶ 101 John called John Yednock to testify to the value of personal property that should be included in the valuation of the Partnership. Yednock concluded that the Partnership owned approximately \$43,000 in personal property. Regina Popielec then testified that in 2004, property managers in the area of the Partnership properties charged five or six percent of rent collected as a property management fee.

¶ 102 John also called Julio Lopez and Mary Villareal to testify. They are both employees of the Partnership. Lopez testified that he shows vacant apartments to prospective tenants in both Partnership and non-Partnership buildings. Villareal testified that she collects rent from tenants in Partnership and non-Partnership buildings and records it on the rent boards. She testified that she receives calls for maintenance on some non-Partnership buildings and notifies Thomas of those calls, but does not know whether Partnership employees perform the maintenance.

¶ 103 John then testified that he attended the family meeting at which Thomas told his siblings he wanted to buy their limited partnership interests. He stated that he asked Thomas for some

accounting of the Partnership, but Thomas refused to provide it. Thomas then sent John several documents showing the amount of his Partnership interest in June of 2005, which were similar to the documents Patrick received. A typed document showed that the sum of the value of John's interest "Pre-Death" and "Post-Death" was \$319,280. After deducting a proportionate amount of Cornelius's estate taxes, the document concluded that John's interest was valued at \$138,405.

¶ 104 John also received a handwritten document that he testified was prepared by Thomas. Starting with the \$138,405 amount, Thomas added Partnership income and capital that John was due, deducted a 12% "management fee"; \$3,000 for Patrick's share of Cornelius's burial costs; \$5,000, which was the value of a van John got after Cornelius's death; and \$29,110 to reimburse Thomas and James for other taxes paid on John's behalf. After all of these deductions, Thomas represented that John was owed \$135,031.

¶ 105 John testified that he received a proposed buyout agreement from Thomas in August of 2005. That agreement stated that the Partnership was purchasing John's 14.1115% interest for \$135,031. The agreement was accompanied by a handwritten note from Thomas stating that he would send John a check after he received the signed agreement. John did not discuss the proposed agreement with Thomas and did not sign it.

¶ 106 Around the end of 2005, John received some additional documents from Thomas, including a handwritten note that said, "This is an account that was set up with the buy[]out proceeds in yours and my name your SS# [sic]. You are beneficiary [sic] when you are ready I will cut the check [sic]." Thomas included a statement from the account showing that it contained \$135,031.

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¶ 107 Thomas sent John another note that said, “As we discussed, the amount of tax that was paid by Tom & Jim for you is being deducted from your share of Partnership [*sic*]. As of 4-28-05 your interest of 14.1115% was reduced by 10.681% for total interest of 3.430 [*sic*].” Thomas prepared more handwritten calculations showing that the combined value of the estate taxes and other expenses owed by John totaled more than \$340,000, or about 10.681% of the value of the Partnership. Therefore, Thomas reduced John’s percentage ownership by that amount and concluded that John only owned 3.4305% of the Partnership. John testified that he never agreed to this reduction of his ownership interest with Thomas. After receiving these documents, John again contacted Thomas seeking additional documentation for the Partnership, but Thomas refused to provide it.

¶ 108 Shortly thereafter, John retained counsel and sent a formal request for an accounting and demanded access to certain Partnership documents. John testified that the Partnership’s 2005 income tax return showed that he no longer held an interest in the Partnership even though he had never agreed to sell his interest.

¶ 109 John stated that he spoke with James frequently. In late 2006 or early 2007, James began providing John with copies of the Partnership’s rent boards and accounting information. John testified that James told him “there was a lot of money missing.” James also told him that Thomas was “living a lavish lifestyle” while also “beating it into [James’s] head that the [Partnership] is not making any money.” Shortly thereafter, John loaned James money to retain an attorney and this lawsuit followed.

¶ 110 On cross-examination, John admitted that he had no documentation to support his claims

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that he asked Thomas for documents or that Thomas refused to provide them. He also admitted that after his attorney requested Partnership documents, he received several income tax returns, the Rossell appraisals, and the May 20, 2005, letter from Zoller regarding the value of Cornelius's estate. He also acknowledged that the bank account proceeds he received after Cornelius's death were insurance proceeds from the destruction of a building that he did not own and that he did not pay any taxes on that money.

¶ 111 James was called to testify as an adverse witness. James testified that the Partnership paid \$45,000 to the Internal Revenue Service for his personal income taxes; \$15,000 to James's divorce attorney; \$75,425 to James for "personal expenses"; and more than \$451,000 to James for his divorce settlement, none of which he repaid to the Partnership. He also testified that he has not repaid the Partnership for his share of the taxes on Cornelius's estate. James testified that he and Thomas entered into an agreement whereby Thomas personally loaned James the \$451,000 for his divorce settlement. However, he also admitted that Thomas used Partnership funds to pay the loan. He stated that there was no written agreement between Thomas and the Partnership indicating that Thomas was required to repay that money to the Partnership. James testified that he and Thomas ran the Partnership using the same business practices that Cornelius had used.

¶ 112 Thomas also testified as an adverse witness. He testified that he was not liable to repay the Partnership the \$451,000 James borrowed for his divorce settlement that was funded with Partnership money. He stated that James was responsible for repaying the funds. He stated that his written agreement with James was intended to "guarantee that the [P]artnership would not be

[a]ffected by the money that was going to Jim.” However, on cross-examination, Thomas admitted that he personally agreed to loan James the money but provided James with Partnership funds. He also admitted that since he has settled his claims with James, he no longer intends to repay the money to the Partnership. However, Thomas stated that James owes John a proportionate share of the money he borrowed, which amounted to about \$70,000 or \$80,000.

¶ 113 Thomas testified that he also did not repay the Partnership for his full share of Cornelius’s estate taxes, which would have been more than \$450,000, and acknowledged that James did not repay his share of the estate taxes either. However, Thomas agreed that their portions of the estate taxes should be considered assets of the Partnership. He testified that they would repay the taxes to the Partnership.

¶ 114 Thomas acknowledged that he provided the information used to prepare the Partnership’s 2005 income tax return, which represented that Mary and John held no interest in the Partnership despite the fact that they had not agreed to sell their interests at the time of that filing. He admitted that he falsely told his tax preparer that Mary and John sold their interests to James and Thomas on November 30, 2005. Thomas explained that he “anticipated” that they would be bought out and that it was “just a matter of time.” On cross-examination, he stated that he did not include John as a limited partner in subsequent years’ tax returns either because he learned from James and Patrick that John had not filed his personal income tax returns in several years and, therefore, Thomas did not want to “draw any attention to the Partnership” by listing John as a limited partner. However, he admitted that he never confirmed that story with John.

¶ 115 Thomas testified that he and James wanted to buy their siblings out of the Partnership

because they wanted to continue running the Partnership as they had been doing. Thomas testified that he had been responsible for all of the Partnership's expenses for 10 or 12 years by the time Cornelius died. None of his siblings had ever been involved in the operation of the Partnership, and two lived far from Chicago; therefore, he did not believe that any of them would be interested in the Partnership. He also did not think that any of his siblings would make good business partners.

¶ 116 Regarding the document that showed John's limited partnership interest reduced to 3.430%, Thomas testified that he wanted to "emphasize" to John that he had to pay his expenses to the Partnership. He testified that he did not actually reduce John's Partnership interest.

¶ 117 b. Thomas and James's Motion for Directed Findings

¶ 118 James and Thomas then filed motions for directed findings on the claims for an accounting, breach of fiduciary duty, and declaratory judgment. The court first noted that John had presented a *prima facie* case on each of his claims. With respect to the breach of fiduciary duty claim, the court made a number of factual findings. It specifically found that James and Thomas "conducted the business consistent with the practices of their father"; relied on experts' opinions in valuing the Partnership and their siblings' limited partnership interests; and that they exercised their business judgment in making Partnership decisions, including whether or not to make distributions to the limited partners. The court concluded that "all conduct complained of by John has been admitted by James and Thomas; however, it was John's burden to prove that such conduct was wrongful." Because he did not do so, the court directed its finding in favor of Thomas and James on the breach of fiduciary duty claim.

¶ 119 The court also entered a directed finding in favor of Thomas and James on the accounting and declaratory judgment claims. However, the court made no factual findings on those claims and did not provide any rationale for its decision.

¶ 120 c. Evidence Presented by Thomas

¶ 121 Before proceeding with Thomas's case, the court determined that Thomas would serve as the liquidating trustee for the wind-up. Relying specifically on section 16.1 of the Agreement, the court noted that "the general partner serves as the liquidating trustee during dissolution" and appointed Thomas to that position. It also stated that the settlement agreements between James and Thomas would be "part of any final wind[-]up consideration that must be approved by the [c]ourt."

¶ 122 Thomas then called Alan Rossell to testify to the value of the Partnership properties, which was based on his 2004 appraisals. John's counsel first conducted a *voir dire* of Rossell. He established that Rossell was licensed as a certified residential real estate appraiser, but only qualified to appraise multi-unit buildings up to four units. His wife, Bonnie, was a certified general appraiser qualified to appraise larger buildings like the Partnership properties. He testified that Bonnie supervised his appraisals of Partnership properties and was qualified to sign off on them. He acknowledged that he was not qualified to sign off on another appraiser's report on the value of large multi-unit buildings like the Partnership properties. John's counsel moved to bar Rossell from testifying about appraisals he did not conduct or supervise. The court denied the motion.

¶ 123 Rossell testified that in his opinion, the values of the Partnership properties in 2004 were

as stated in the appraisal reports he prepared for the purpose of valuing Cornelius's estate. As for the reports that Rossell did not prepare, he testified that the appraiser, Lauren Scott, performed the physical inspection of the building, acquired the comparable sales, and wrote the appraisal report. He and his wife, Bonnie, reviewed Scott's conclusions and Bonnie signed the report in her capacity as a certified general appraiser. He testified that he did not know the source of the comparable sales information underlying the appraisals.

¶ 124 He testified that in October of 2007, he performed an analysis of market trends in the three neighborhoods in which the Partnership properties are located. He concluded that at that time, the values of the properties in those neighborhoods "had remained relatively stable and did not increase [at] the rate noticed in other neighborhoods of Chicago." Additionally, he opined that "the market ha[d] not improved significantly for investment-type properties" in the areas where the Partnership properties were located. In light of his market trend analysis and the distressed property sales in the area, Rossell concluded that there was a "downward trend in value" as compared to the 2004 appraisal values. However, he admitted that he did not conduct a new appraisal.

¶ 125 Rossell then testified about comparable sales information used by Lorenz in his appraisals. He stated that two of those properties were subsequently resold and the purchase price was significantly less than the value relied upon by Lorenz. On cross-examination, Rossell admitted that those were foreclosure sales. Additionally, he testified that two of the other comparable sales Lorenz relied on were for properties that were now in foreclosure or in receivership. He expected that those two properties would be sold for significantly less than the

value relied upon by Lorenz.

¶ 126 Thomas then testified on his own behalf. He testified to the contents of a chart showing what each of his siblings' interests in the Partnership was, after Cornelius's death and the buyouts of Ann and Patrick. The chart was admitted as defendant's exhibit 40. He first testified that Cornelius's 56.81% limited partnership interest – as well as his 1% general partnership interest – were to be distributed among him and his siblings in percentages provided for in Cornelius's trust.

¶ 127 Thomas then explained that after Patrick's buyout in August 2005, he distributed Patrick's limited partnership interest among the remaining limited partners. At that time, the remaining limited partners were Ann, Mary, John, Thomas, Thomas's wife and two children, and James, his ex-wife, Judith, and his two children. Thomas testified that he apportioned a larger percentage of Patrick's interest to himself because the Blue Island property, which was used to compensate Patrick, was a property that Thomas owned.

¶ 128 Thomas then distributed Ann's limited partnership interest among the remaining limited partners after her October 2005 buyout. At that time, the distribution totals were as follows: Mary held 9.283%; Thomas held 35.935%; James held 31.905%; John held 16.484%; and Mirna, Judith, and their four children each held 1.064% .

¶ 129 Thomas again testified that he assisted Mirna in preparing the annual income and expense reports. He stated that the rent from tenants in the retail space of the Partnership buildings has decreased due to vacancies and rent concessions. He testified that there has been a 7% to 10% vacancy rate in the residential units since 2006. Thomas also testified that he did not include as

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expenses more than \$80,000 owed to Maurice as reimbursement for estate tax payments, approximately \$165,000 paid to Patrick and Ann for their buyouts, or over \$465,000 of Partnership money used for James's divorce settlement and expenses. He also prepared an income statement for the period from 2004 to 2010, which showed that the Partnership generated over \$475,000 in net income during that period. However, after deducting the unallocated expenses above, as well as his litigation costs in this case, he concluded that the Partnership had a net loss of \$497,964.81 for those years.

¶ 130 On cross-examination, Thomas admitted there was a "typo" in the annual report that understated the Partnership's 2005 net income by \$35,000 and understated the 2009 monthly income by more than \$10,000. John's counsel attempted to ask Thomas additional detailed questions about income and certain expenses. Defense counsel objected, arguing that such details were irrelevant because the court's earlier ruling that limited partners were not entitled to cash distributions under the Agreement meant that the Partnership's cash flow should not be considered an asset of the Partnership to be included in the valuation. The court sustained the objection.

¶ 131 Thomas then testified to a spreadsheet he prepared showing that the total value of the Partnership buildings, as of May 31, 2010, was \$5,441,318.50. The value represented the 2004 Rossell appraisals minus any mortgage balances and security deposits owed.

¶ 132 Based on that amount, he prepared worksheets showing the value of the partnership interests owned by James, John, and himself according to the percentages contained in exhibit 40. He then added certain credits to reflect what he believed each of them was owed.

Specifically, Thomas determined that John was entitled to a credit for a proportionate amount of James's divorce expenses. He also credited John with a proportionate amount of the estate taxes and burial fees that Thomas and James still owed to the Partnership. However, Thomas deducted from that the initial \$160,000 loan he made to the Partnership to pay the taxes. He also deducted more than \$112,000 in attorney fees that he and James personally paid in this litigation.

¶ 133 Thomas also deducted a proportionate share of the estate taxes on John's inherited portion of Cornelius's partnership interest and the joint bank account. He deducted other charges for the value of a van and personal income taxes that Thomas and James paid on cash that John received. Thomas also deducted over \$56,000 in "outstanding expenses." After applying all debits and credits, Thomas concluded that John was owed \$609,890.09.

¶ 134 During closing arguments, the parties and the court discussed at length how the Partnership property would be distributed after determining the value of each party's share. In reference to orders rendered on the first day of trial, the court reiterated its intention to honor the settlement agreements between Thomas and James, which allowed them to divide the six Partnership properties among themselves and refinance them in order to pay a cash settlement to John, who was only entitled to a cash settlement.

¶ 135 *2. The Court's Ruling*

¶ 136 The court then delivered its ruling. It accepted Thomas's valuation of the Partnership at \$5,441,318.50, based solely on the net value of its properties. The court specifically found Rossell's 2004 appraisals to be "acceptable" for determining the current value of the Partnership.

¶ 137 The court also largely accepted Thomas's calculation of the credits and debits to be

applied to John's partnership interest. However, it eliminated deductions Thomas made for the value of the van and the personal income taxes paid by him and James. The court also rejected Thomas's receipt of a weighted percentage of Patrick's interest to compensate for his ownership of the Blue Island property. The court concluded that John held an 18.15% interest in the Partnership. After applying its modifications, the court concluded that John was entitled to \$704,533.88. The court further ordered that all distributions, including the distribution of the Partnership properties as outlined in Thomas and James's settlement agreement, should be made within 90 days of the entry of the order.

¶ 138 B. Analysis

¶ 139 John appeals from the court's determination of the value of the Partnership and his interest in it, as well as the court's award of attorney fees for Thomas and James. He also contests the court's determination that he is not entitled to an in-kind distribution of the Partnership properties as part of his compensation.

¶ 140 1. *Thomas and James's Status as General Partners*

¶ 141 Throughout this litigation, John has argued that Thomas and James were not duly appointed general partners pursuant to the terms of the Agreement. Specifically, he contends that Thomas and James executed a document purporting to appoint themselves as successor general partners after Cornelius's death. The document represented that as of January 1, 2005, Thomas and James collectively held more than 75% of the profit sharing interests of the Partnership and that they appointed themselves as general partners pursuant to section 12.3 of the Agreement. However, John maintains that their self-appointment was invalid because their combined interest

was less than 75% and they did not otherwise have the requisite support to become general partners.

¶ 142 John has challenged the validity of their appointment in the context of several of his derivative claims. For example, shortly after Intervenor joined this litigation, they petitioned for receivership based, in part, on the allegedly faulty appointment of Thomas and James.

Intervenor also challenged Thomas and James's status as general partners in their motion for summary judgment on the issue of dissolution. Additionally, count VI of the complaint seeks a declaratory judgment that because Thomas and James were not duly appointed general partners, they were not entitled to have their attorney fees paid with Partnership funds.

¶ 143 The court addressed the issue in each of those proceedings. After an evidentiary hearing on Intervenor's receivership claim, the court concluded that "none of the evidence [presented was] persuasive in terms that suggests that the history of Thomas and James being appointed or appointing themselves as general partners was inappropriate," but declined to appoint a receiver for other reasons. The court also granted the motion for partial summary judgment on the dissolution claim; although, without the hearing transcript, it is not clear how the court decided the issue in that proceeding. The court also entered a directed finding on the declaratory judgment claim, but did not address the improper appointment challenge at all, or any other basis for the challenge to indemnification for Thomas and James's attorney fees, except to acknowledge that John had presented a *prima facie* case for the claim.

¶ 144 Thus, the issue of Thomas and James's self-appointment was before the circuit court in a variety of ways and the parties presented evidence and argument in support of their positions

each time. However, the manner in which the court should or did address the issue varied as well. Nevertheless, we need not determine the precise procedural posture from which to conduct our review. This is because on appeal and elsewhere in the court below, Thomas and James have conceded that they did not in fact hold at least 75% of the profit sharing interest in the Partnership at the time that they executed the January 1, 2005, document, and were not otherwise appointed by limited partners holding 75% of the Partnership's interests.

¶ 145 Where there is no factual dispute and only the construction of an agreement is at issue, the legal effect and interpretation of the agreement is a question of law that the appellate court may independently review. *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 483 (2009); see also *MidAmerica Bank v. Charter One Bank*, 232 Ill. 2d 560, 565 (2009). In such cases, our standard of review is *de novo*. *Covinsky*, 388 Ill. App. 3d at 483; *MidAmerica Bank*, 232 Ill. 2d at 565.

¶ 146 In this case, in his response to John's partial summary judgment motion, Thomas admitted that "[a]lthough Thomas and James did not hold the requisite 75% interest in the Partnership [at the time of their appointment], they held a majority of the interest." In their appellate brief, Thomas and James address the validity of their appointment in a footnote, stating that they appointed themselves general partners not in January of 2005, as stated in the appointment document, but in October of 2005, after the buyouts of Patrick and Anne. And yet, even then, they admit that based on their own calculations, Thomas and James held only 73% of the Partnership interests at the time of their appointment.⁵ Additionally, in response to our order

⁵ Their calculation of the combined 73% interest includes the profit sharing interests held by James's ex-wife and children and Thomas's wife and children, none of whom were signatories

for supplemental briefing on this issue, Thomas and James further acknowledged that they were not appointed by limited partners holding 75% of the Partnership interests, but argue that John and the other siblings recognized them as “*de facto* general partners.”

¶ 147 Rather, on appeal and in supplemental briefing ordered by this court, Thomas and James argue over the legal effect of their failure to amass 75% of the votes. That is, they argue that their failure to comply with the terms of the Agreement is not fatal to their status as general partners. We disagree.

¶ 148 As with any other contract, when construing a partnership agreement, the primary objective is to give effect to the parties’ intentions. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2010); *Fidelity National Title Insurance Co. v. Westhaven Properties Partnership*, 386 Ill. App. 3d 201, 214 (2007). We look at the agreement as a whole and give effect to every provision contained therein. *Fidelity National Title Insurance Co.*, 386 Ill. App. 3d at 214. Where the words in the agreement are clear and unambiguous, they will be given their plain, ordinary, and popular meaning. *Thompson*, 241 Ill. 2d at 441. Absent any ambiguity, the parties’ intent is derived solely from the language of the contract and we will not construe the contract in contravention of its plain language. *Fidelity National Title Insurance Co.*, 386 Ill. App. 3d at 214.

¶ 149 Section 12.3 of the Agreement provides the procedure for the appointment of a successor general partner after Cornelius’s death. It states that if there are “Additional Limited Partners (including the successors of the deceased, disabled or dissolved General Partners), then such

on the January 1, 2005, document.

Limited Partners as shall hold, in the aggregate, at least seventy five (75%) [*sic*] of the Profit Sharing Interests shall appoint one or more successor general partners.”

¶ 150 We conclude as a matter of law that the Agreement requires the successor general partners to have been appointed by limited partners holding no less than 75% of the Partnership’s interest. The language of the Agreement is clear and unambiguous and must be enforced as written. See *Fidelity National Title Insurance Co.*, 386 Ill. App. 3d at 214 (holding that a material provision of a partnership agreement must be strictly construed). Given Thomas and James’s concession that they did not hold 75% of the Partnership’s interest at the time of their election, we must conclude that they were not duly appointed general partners as contemplated by the Agreement.

¶ 151 It is of no consequence, as Thomas and James argue, that they held the majority interest in the Partnership at the time of their appointment. Although they argue that their majority interest permitted them to elect a successor general partner under section 801(3)(B) of the Uniform Limited Partnership Act (805 ILCS 215/801(3)(B) (West 2008)), that provision does not apply in this case. See 805 ILCS 215/1206(c)(7) (West 2008) (section 801(3) specifically does not apply to limited partnerships formed before January 1, 2005). Nor is relevant that “John knew that Thomas and James were running the business but never said anything about it until he filed suit,” especially in light of Thomas’s testimony that he never notified any of his siblings – the remaining limited partners – that they were entitled to vote for a successor general partner.

¶ 152 We are particularly unconvinced by Thomas and James’s argument that the difference between their claimed 73% ownership and the required 75% ownership is a *de minimus*

discrepancy that may be disregarded by the court, as in *Pacini v. Regopoulos*, 281 Ill. App. 3d 274, 279 (1996). First, we are skeptical of the calculation that gives them a combined 73% ownership. Defendant's exhibit 40, prepared by Thomas, showed that after Ann's buyout in October of 2005, Thomas held a 35.935% interest and James held a 31.905% interest, totaling only 67.84%. They also claim control of at least a 5.52% interest not owned by them personally, but owned collectively by James's ex-wife, his children, and three other members of Thomas's family. Additionally, their calculation assumes that John held a 16.484% interest, based on Thomas's weighted distribution of Patrick's interest. However, the court rejected that methodology and determined that John holds an 18.15% interest. Nevertheless, even taking their calculations as true, we do not accept that the difference between their claimed 73% ownership interest and the 75% interest required by the Agreement is "trifling" as it was in *Pacini*. See *Pacini*, 281 Ill. App. 3d at 279 (holding that while its application was quite rare, the doctrine of *de minimus curat lex* applied to the conclusion that a "94.9953% occupancy rate is essentially a 95% occupancy rate").

¶ 153 Having now concluded that Thomas and James were not duly elected general partners, we must determine the effect of that holding on John's remaining claims. Under similar circumstances, where this court has determined that a corporate board of directors was not elected pursuant to the procedures contained in the corporate bylaws, we remanded the matter to the circuit court to appoint a custodian to conduct a proper election of a board of directors. See *Muhammad v. Muhammad-Rahmah*, 363 Ill. App. 3d 407, 419 (2006). However, we agree with Thomas and James that it is unnecessary to remand for a proper election of a general partner

because the circuit court has already ordered the dissolution of the Partnership, as of August 1, 2008. Following dissolution, all that remains to be done is to wind up the affairs of the Partnership, which consists of converting the Partnership's assets into cash by sale, discharging its liabilities, and distributing any surplus to its members, unless there is unanimous agreement of the partners to proceed differently. *Nelson v. Warnke*, 122 Ill. App. 3d 381, 383 (1984); *Mandell v. Centrum Frontier Corp.*, 86 Ill. App. 3d 437, 449 (1980) (citing *Polikoff v. Levy*, 132 Ill. App. 2d 492, 499 (1971)).

¶ 154

2. Attorney Fees

¶ 155 As to John's remaining claims on appeal, he argues that because Thomas and James were not general partners, they were not entitled to have their attorney fees paid by the Partnership. He seeks to have those funds returned to the Partnership and included among its assets for distribution.

¶ 156 Section 11.5 of the Agreement provides that "the Partnership shall indemnify and hold the General Partner harmless from any loss or damage (including reasonable attorneys' [sic] fees) incurred by the General Partner because of" acts or omissions of the general partner in carrying out his duties on behalf of the Partnership. This provision specifically states that it is intended to indemnify the general partner, to the exclusion of the limited partners. Here, because Thomas and James are not general partners, they are not entitled to indemnification from the Partnership for their attorney fees or any other losses sustained under this provision. See *Fidelity National Title Insurance Co.*, 386 Ill. App. 3d at 214. Our review of the Agreement reveals no other authority for Thomas and James to claim such indemnification or reimbursement. Thus, their

attorney fees were improperly paid with Partnership funds and any fees paid on their behalf pursuant to section 11.5 must be repaid to the Partnership.

¶ 157

3. *The Winding Up*

¶ 158 Pursuant to section 16 of the Agreement, the circuit court determined that because Thomas was the general partner, he would serve as the liquidating trustee. Section 16.1 provides that “[t]he General Partner acting at the time of a liquidation shall become the liquidating trustee.” However, as we have discussed, Thomas was not a duly appointed general partner and was not entitled to be the liquidating trustee under the Agreement.

¶ 159 Section 16.1 further provides that “[i]n the event that there is no general partner acting at the time of the liquidation, then one or more liquidating trustees shall be selected by the Limited Partner.” No such liquidating trustee was selected. Nor would it be constructive to remand the matter for the purpose of selecting a liquidating trustee. Each of the remaining partners has an equal claim to serve as the liquidating trustee. However, given the acrimonious nature of this litigation over the past six years, we doubt that the remaining partners could agree on such an appointment.

¶ 160 Rather, the most equitable and expedient way to proceed is to remand the matter to the circuit court with instructions to appoint an independent liquidating trustee to prepare a report recommending the appropriate distribution of all of the assets and liabilities of the Partnership.

Thomas and James rightly note that pursuant to section 803(d) of the Uniform Limited Partnership Act,⁶ the court has the authority to appoint an independent liquidating trustee where

⁶ To the extent there is any question about whether the Partnership is governed by the winding up provisions of the Revised Uniform Limited Partnership Act (805 ILCS 210/803 (West 1994))

there is none acting pursuant to the terms of the Agreement. See 805 ILCS 215/803(d) (West 2008).

¶ 161 We recognize that much effort has already been expended in the proceedings below and that the circuit court carefully reviewed extensive testimony and evidence in this case. Thus, the independent liquidating trustee shall review the evidence submitted by both parties in support of their valuation of the Partnership. The trustee shall prepare a statement of assets, liabilities, receipts, and disbursements of the Partnership from January 25, 2004, to the date of dissolution. The trustee shall then make a recommendation to the court as to the total value of the Partnership as of the date of dissolution and the amount due to be distributed to each of the remaining limited partners according to the percentages already determined by the circuit court. See *In re Estate of Marks*, 211 Ill. App. 3d at 69-70; *Schane v. Conrad*, 68 Ill. App. 3d 961, 966 (1979) (citing *Polikoff v. Levy*, 132 Ill. App. 2d 492, 499-500 (1971)) (describing the components of a final account of a partnership on dissolution).

¶ 162 Specifically, the trustee's report shall address the following topics and make recommendations as to:

(1) the value of the Partnership properties as of August 1, 2008, the date of dissolution. If necessary, the trustee shall order new real estate appraisals for this purpose;

(2) the proper treatment of the estate taxes paid by the Partnership on behalf of Cornelius's estate, whether as an appropriate expenditure of the Partnership, an indebtedness of

(repealed by Pub. Act 93-967, Art. 14, §1401 (eff. Jan. 1, 2008)) or the Uniform Limited Partnership Act (805 ILCS 215/803(d) (West 2008)), we note that the court has the same authority under either statutory scheme.

the estate to the Partnership, or some other treatment. This shall include a review of the estate tax filing submitted by the executor to determine the date of death assets of Cornelius McAuliffe's probate estate and a report on the status of the probate estate. The trustee shall also determine whether John is liable to the Partnership for taxes paid on the proceeds he received from the bank account held jointly with Cornelius;

(3) the proper treatment of all costs and fees attributable to James's divorce settlement, including maintenance, child support payments, attorney fees, and any related payments, for which Partnership funds were used;

(4) the value of all attorney fees paid by the Partnership for attorney fees incurred by Thomas and James in the course of this litigation and the effect of the repayment of those fees on the value of the Partnership's assets;

(5) the value of the Partnership assets after paying additional consideration to Patrick pursuant to this order;

(6) any other matters the circuit court deems necessary.

Giving due consideration to the recommendations of the independent liquidating trustee, the circuit court shall then direct, supervise, and allocate the distribution of the assets and liabilities of the Partnership.

¶ 163

4. The Method of Distribution of Partnership Assets

¶ 164 Finally, John contends that he is entitled to an in-kind distribution of Partnership property in lieu of a cash distribution. The circuit court held that as a limited partner, John was not entitled to an in-kind distribution and that Thomas and James, as general partners, could

apportion the properties among themselves in proportion to the value of their Partnership interests. The court based its decision on section 16.2 of the Agreement.

¶ 165 Section 16.2 states that “[u]pon liquidation, all non-cash assets of the Partnership may be sold upon such terms and conditions and in such manner as the General Partner, or other liquidating trustee, in its sole discretion shall determine.” Because they are not general partners, Thomas and James are not entitled to determine the terms and conditions of the sale of the Partnership properties. Consequently, they are not entitled under the Agreement to take the Partnership properties as their share of the distribution and sell it at their discretion, but are limited to receiving cash distributions. However, the remaining partners may agree among themselves to a method of sale at dissolution. *Mandell*, 86 Ill. App. 3d at 449 (quoting *Polikoff*, 132 Ill. App. 2d at 499). Failing that, the Partnership’s assets must be sold at a public judicial sale or as otherwise determined by the court’s independent liquidating trustee in accordance with section 16.2. *Mandell*, 86 Ill. App. 3d at 449 (quoting *Polikoff*, 132 Ill. App. 2d at 499).

¶ 166 IV. CONCLUSION

¶ 167 On Patrick’s claim for breach of fiduciary duty, Thomas failed to prove by clear and convincing evidence that he freely and frankly disclosed all relevant information and documentation to Patrick at the time of the proposed buyout. For that reason, the transaction is presumed constructively fraudulent and Patrick is entitled to monetary damages.

¶ 168 On John’s derivative claims, we have determined that Thomas and James were not duly appointed general partners. For that reason, they were not entitled to have their attorney fees paid with Partnership money. Moreover, Thomas was not entitled to serve as the liquidating

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trustee after the court ordered dissolution of the Partnership. Rather, the circuit court should appoint an independent liquidating trustee to review the parties' submissions and make a final recommendation on the amount of the Partnership's assets available for distribution. The liquidating trustee may also make recommendations as to the terms and conditions of the sale of the Partnership's non-cash assets.

¶ 169 For all of the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with this order.

¶ 170 Affirmed in part and reversed in part; cause remanded.